(2)

No. 96-1829

In The

Supreme Court of the United States

October Term, 1996

STATE OF MONTANA, ET AL.,

Petitioners,

v.

CROW TRIBE OF INDIANS,
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CROW TRIBE IN OPPOSITION

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QUESTION PRESENTED

Whether the State of Montana and Big Horn County should be required to pay the Crow Tribe, or the United States on its behalf, the 30% taxes they illegally imposed and collected on coal produced from deposits beneficially owned by the Tribe and paid to the State and County by the Tribe's lessee where the taxes were found to appropriate the Tribe's mineral wealth to deprive the Tribe of revenues it otherwise would have received, to impose substantial burdens on the Tribe, to violate the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and to interfere with the Tribe's sovereignty.

PARTIES

All of the parties are listed in the caption of the petition.

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The opinion of the Ninth Circuit Court of Appeals that is the subject of this appeal is reported at 92 F.3d 826 and 98 F.3d 1194 (1996) (*"Crow IV"*) and is reproduced in the Appendix to the Petition (Pet. App.) commencing at 1. Prior decisions in this matter by the Ninth Circuit are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982) (*"Crow I"*), *cert denied*, 459 U.S. 916 (1982), reproduced in the Pet. App. commencing at 167 and 169; at 819 F.2d 895 (1987) (*"Crow II"*), reproduced in the Pet. App. commencing at 88; and at 969 F.2d 848 (1992) (*"Crow III"*), reproduced in the Pet. App. commencing at 58. This Court's prior summary affirmance of the Court of Appeals' 1987 decision in *Crow II* is reported at 484 U.S. 997 (1988), reproduced in the Pet. App. at 87.

The opinion of the District Court in *Crow IV* is unreported and is reproduced in the Pet. App. commencing at 17. The prior reported opinion of the District Court, which was the subject of review by the Court of Appeals in *Crow I*, appears at 469 F.Supp. 154 (D. Mont. 1979), and is reproduced in the Pet. App. commencing at 197. The District Court's prior reported opinion reviewed in *Crow II* appears at 657 F.Supp. 573 (D. Mont. 1985), and is reproduced in the Pet. App. commencing at 110. An unreported opinion of the District Court reviewed by the Court of Appeals in *Crow III* is reproduced in the Pet. App. commencing at 67.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1996. The petition for rehearing of the State of Montana and the other petitioners (Montana) was denied on February 21, 1997. Pet. App. 228. The petition for a writ of certiorari was docketed on May 16, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

In *Crow II*, the Court of Appeals for the Ninth Circuit held that Montana's severance and gross proceeds taxes on coal produced from the Tribe's coal deposits impermissibly infringed on the Crow Tribe's sovereignty and interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, were not narrowly tailored to achieve Montana's legitimate interest, and therefore were preempted by federal law. 819 F.2d 895, Pet. App. 88. See *Crow IV*, 92 F.3d at 828, Pet. App. 6 (summarizing the holding of *Crow II*). This Court summarily affirmed without opinion. 484 U.S. 997 (1988), Pet. App. 87.[1] The issue presented in the petition,

[1] In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 & n.17 (1989), this Court distinguished Montana's "unique" and "extraordinarily high" coal taxes which imposed a "substantial burden" on the Crow Tribe from the state oil and gas taxes there at issue, upheld the validity of those state oil and gas taxes as applied to tribal minerals, and declined to reexamine its summary affirmance in *Crow II*.

whether Montana and Big Horn County should be allowed to keep the taxes they illegally collected on the Tribe's coal from the Tribe's lessee at the Tribe's expense, arises from that holding.

The provisions of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, are reproduced in the Appendix to the Crow Tribe's Conditional Cross-Petition.

STATEMENT OF THE CASE

A. Factual Background

In 1972, the Crow Tribe (Tribe) and Westmoreland Resources (Westmoreland) entered into a coal lease pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S. §§ 396a *et seq*. In 1974, the Tribe and Westmoreland successfully renegotiated the terms of their lease. The lease and the amended lease were approved by the Department of the Interior. Production at the Westmoreland mine, which is located in an area known as the "ceded strip" located north of the exterior surface boundaries of the Crow Reservation, commenced in 1974. Pet. App. 30.

In April 1975, Montana enacted statutes imposing severance and gross proceeds taxes on coal produced within the State. There were no exceptions for coal owned by Indian tribes. Mont. Code Ann. §§ 15-35-101 to 111, 15-23-701 to 704. The severance tax rate charged on Crow coal produced during the 1975-1982 period at issue in the instant case was 30% of the value of the contract sales price of the coal. Pet. App. 25. The rate of the gross proceeds tax is equivalent to the number of mills levied

for general property tax by the county in which the production occurred. The amount of the gross proceeds tax on Crow coal varied somewhat from year to year but was generally in the range of approximately 5% of the contract sales price. Pet. App. 25-26. The effective rate of the combined severance and gross proceeds tax exceeded 32% of the coal's contract sales price taking account of allowable deductions and adjustments. *Crow II*, 819 F.2d at 899 n.2, Pet. App. 98; *Cotton Petroleum*, 490 U.S. at 186 n.17.

Tribal representatives appeared before the Montana legislature and strongly opposed the imposition of the proposed severance and gross proceeds taxes on Crow coal on the grounds that:

> (1) they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) . . . the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana . . . [and 3] . . . this level of taxation is so high that [it] becomes an unauthorized state interference with federally secured Indian property.

ER 1.[2] The Tribe proposed a compromise to the legislature under which producers would receive a credit against state taxes for coal taxes paid to Indian tribes. The Senate Taxation Committee rejected the Tribe's proposal, commenting that "there would have to be court decreed

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[2] "ER" refers to the Tribe's excerpts of record filed with the Court of Appeals for the Ninth Circuit in *Crow IV*.

settlements regarding Indian coal revenues." ER 5. *See Crow IV*, 92 F.3d at 829, Pet. App. 9; Pet. App. 23.

In enacting the coal taxes, the Montana legislature found that strip-mined coal is in sufficient demand that:

> [A]t least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes. . . .

Mont. Code Ann. § 15-35-101(1)(e). In *Crow I*, 650 F.2d at 1113, Pet. App. 185, the Court of Appeals quoted this legislative finding and stated: "[b]y setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent."[3] *See also, Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow IV*, 92 F.3d at 829, Pet. App. 10 ("we had . . . found [in *Crow I*] the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal . . . ").

The Tribe enacted its own 25% severance tax in early 1976. The tribal tax was approved by the Interior Department as applied to the coal within the exterior surface boundaries of the Reservation but not as to the Tribe's coal within the ceded strip. Interior's decision not to approve the tribal tax as applied to tribal coal located in the ceded strip was based on its belief at that time that that coal could not be taxed under the Tribal Constitution because it was not part of the Crow Reservation. Pet.

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[3] " 'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." *Crow I*, 650 F.2d at 1113 n.12, Pet. App. 185.

App. 19, 31; *Crow I*, 650 F.2d at 1107-08 & 1115 n.19, Pet. App. 172, 192; *Crow II*, 819 F.2d at 897, Pet. App. 93.

It was subsequently determined in *Crow II* that the Tribe's minerals within the ceded strip are part of the Crow Reservation. 819 F.2d at 896-98, Pet. App. 91-95. The United States has acknowledged, and the District Court found, that the government was mistaken in not approving the Tribe's tax as applied to its ceded strip coal. Ninth Circuit Brief for the United States at 19-21; Ninth Circuit Reply Brief for the United States at 6; Pet. App. 36, 69, 78. There is no claim or evidence that Montana or Big Horn County relied to their detriment on either Interior's disapproval of the Tribe's 1976 tax as applied to the tribal coal mined by Westmoreland or the Tribe's subsequent, unsuccessful efforts to amend its Constitution.

Westmoreland began paying the gross proceeds tax to Big Horn County in 1975 and the severance tax to Montana in 1976. Westmoreland paid $46.8 million to the State between 1975 and 1983 and $11.4 million to the County between 1976 and 1986. Pet. App. 23-27. The taxes were not paid under protest and Westmoreland did not initiate any proceeding to recover refunds. Westmoreland later entered into an agreement waiving any claim to a refund. Pet. App. 22, 37. No taxes were paid to the Tribe during these periods. Pet. App. 31, 35. Montana and Big Horn County received almost four times more money in severance and gross proceeds taxes from Westmoreland than the Tribe received in royalties under its 1974 amended lease. *Crow I*, 650 F.2d at 1107, Pet. App. 172.

The Tribe initiated discussions with Westmoreland in 1976 seeking payments in addition to the royalties required under the 1974 amended lease. Westmoreland's position was that "any additional payment to the Tribe would have to be in lieu of, rather than in addition to, the State tax." ER 12. *See Crow IV*, 92 F.3d at 830, Pet. App. 12 ("Westmoreland was willing to pay coal taxes to the Tribe as early as 1976 . . . "). Westmoreland did not make any additional payments to the Tribe until after the Court of Appeals' decision in *Crow II*. Pet. App. 35.

Montana and Big Horn County derived significant revenues from the Westmoreland mine from sources other than the illegal severance and gross proceeds taxes on Crow coal including property, income and resource indemnity taxes which have not been contested by the Tribe or the United States. Uncontroverted evidence showed that these sources generated far more income for Montana and Big Horn County than those entities expended for services related to the Westmoreland mine. *Crow IV*, 92 F.3d at 829-30, Pet. App. 11.[4]

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[4] The expert witness for the Tribe and the United States testified that from 1976 to 1986 Montana and Big Horn County received approximately $29 million in revenues from the Westmoreland mine from sources other than their invalid severance and gross proceeds taxes while the governmental costs associated with the mine during the same period were no more than $5 million. ER 121, 124, 130-33, 137, 228b-228e.

Montana's description of the services provided by the State and the County to Crow tribal members (Pet. 8-9) is inaccurate and misleading. The petitioners neglect to point out that the District Court found that those "services would have been rendered even in the absence of Westmoreland's . . . mine and were not related to the mine." Pet. App. 38. They also fail to

In 1982, following the decision in *Crow I*, the Tribe and Westmoreland reached agreement on a tax amendment to their 1974 lease which was approved by the Interior Department. Westmoreland agreed to pay the Tribe taxes equal to Montana's severance and gross proceeds taxes and the Tribe agreed to give Westmoreland a credit for severance and gross proceeds taxes paid to Montana and Big Horn County. In January 1983, the District Court issued a preliminary injunction against collection of the state severance tax and granted a motion allowing Westmoreland to deposit its severance tax payments into an escrow account managed by the Court. The same relief was granted as to the gross proceeds tax in November 1987, following the decision in *Crow II*. Pet. App. 31-32, 35.

Approximately $24 million was deposited into the Court's escrow account between 1983 and 1987. In 1989, after this Court's summary affirmance in *Crow II*, the District Court issued a final judgment distributing the funds held in escrow, including accrued interest, to the United States in trust for the Tribe. *Crow IV*, 92 F.3d at 828, Pet. App. 7; Pet. App. 35; ER 91a. There was no appeal from that judgment. Since 1988, Westmoreland has paid all severance and gross proceeds taxes on Crow coal

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mention the substantial number of jobs in Montana and Big Horn County and the significant tax and other revenues attributable to the Tribe and to the Crow Indian Reservation. *See* Plaintiffs' Ex. 351 at 31-32; V Tr. 840-48 (1994). For these and other reasons the District Court did not consider State and County services provided to Crow tribal members in its balancing of equitable factors bearing on whether the State and County were unjustly enriched. Pet. App. 38, 44-54.

to the Tribe pursuant to the 1982 amendment to the 1974 lease. Pet. App. 36. The issue in the instant case concerns the disposition of the severance taxes ($46.8 million) and the gross proceeds taxes ($11.4 million) illegally imposed on the Tribe's coal and collected by the State and County from Westmoreland.

Neither Montana nor Big Horn County placed the contested tax payments in escrow until ordered by the District Court. *Crow IV*, 92 F.3d at 829 n.3; Pet. App. 9. Significant portions of all of the coal severance revenues received by Montana were, however, deposited into the Constitutional Trust Fund established under Article IX, Section 5, of the Montana Constitution. 25% of coal severance tax revenues were allocated to the Fund between 1977 and 1979; since 1980 the Fund has received 50% of those revenues. The principal of the Fund can be spent only with the approval of ¾ of the Montana legislature. *Crow I*, 650 F.2d at 1108, Pet. App. 173; Pet. App. 25. As of June 30, 1993, the value of the Fund was $512 million. Pet. App. 25.

Montana's coal severance tax has generated "enormous revenues," principally paid by out-of-state utility customers. *Cotton Petroleum*, 490 U.S. at 186 n.17 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 641-42 (1981) (Blackmun, J. dissenting)). From 1975 through 1993, Montana received more than $1.1 billion in coal severance taxes. As of the end of 1993, the value of those revenues (with interest based on the rate of return earned by Montana's Constitutional Trust Fund) exceeded $3.8 billion of which $263 million, less than 7%, represented the value (with interest based on the same rate of return)

of the severance taxes Montana collected on Crow coal. ER 122-23, 125, 228m-228n.

B. Crow II

The holding in *Crow II*, that Montana's severance and gross proceeds taxes as applied to Crow coal interfered with the purposes underlying the Indian Mineral Leasing Act and infringed on the Tribe's sovereignty, was based on the following findings, among others: (i) by enacting its coal taxes in 1975 and applying those taxes to coal beneficially owned by the Tribe, Montana intended to, and did in fact, appropriate most of the economic rent attributable to strip-mined coal and thereby appropriated the Tribe's mineral wealth to itself and deprived the Tribe of royalties and taxes the Tribe otherwise would have earned, *Crow I*, 650 F.2d at 1113-14, Pet. App. 185-87; *Crow II*, 819 F.2d at 902, 902-03, Pet. App. 104-05, 107; *Crow IV*, 92 F.3d at 830, Pet. App. 11-12; (ii) Montana's taxes "forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties for the Tribe," *Crow II*, 819 F.2d at 899, Pet. App. 97; (iii) Montana's coal taxes reduced tribal revenues by impairing the marketability of the Tribe's coal, *Crow II*, 819 F.2d at 903, Pet. App. 109; (iv) "[t]he tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. . . . By taking revenue that would otherwise go towards supporting the Tribe and its programs . . . the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development," *Crow II*, 819 F.2d at

902-03, Pet. App. 107 (citation omitted); and (v) "Montana's coal taxes . . . interfere with tribal economic development and autonomy," *Crow II*, 819 F.2d at 903, Pet. App. 108. *See also*, *Crow III*, 969 F.2d at 848-49, Pet. App. 59-60 (reiterating several of the *Crow II* findings); *Cotton Petroleum*, 490 U.S. at 186 n.17 (distinguishing Montana's "unique," "unusually large," and "extraordinarily high" coal taxes, which "imposed a substantial burden on the Tribe" and "had a negative effect on the marketability of coal produced in Montana," from New Mexico's oil and gas taxes there at issue).

C. Crow III

Crow III concerned the claim of the United States and the Tribe to the severance and gross proceeds taxes illegally imposed and collected by Montana and Big Horn County from Westmoreland before the disputed money was paid into the District Court's escrow account.[5] The District Court denied the motion of Montana and Big Horn County to dismiss those claims. Pet. App. 67-86. Citing the Montana Supreme Court's decision in *Valley County v. Thomas*, 97 P.2d 345 (1939), as well as cases from

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[5] This claim had not been asserted by the Tribe, and the United States had not yet intervened, when *Crow I* was decided. Consequently, the issue concerning the Tribe's right to recovery of these taxes was not presented to the Court of Appeals in *Crow I*. Under these circumstances, the Ninth Circuit's observation in *Crow I* (650 F.2d at 1113 n.13, Pet. App. 186 (emphasis added)) that the Tribe "is *apparently* not entitled to any refund if the tax statutes are declared invalid," was rightly accorded no weight in that Court's subsequent decisions. *See* Pet. 6 n.3.

other jurisdictions,[6] the District Court held that "an action for restitution may be maintained by one governmental entity against another even though the plaintiff is not the source of the funds." Pet. App. 80.

The Ninth Circuit initially accepted an interlocutory appeal to determine whether the United States and the Tribe could state a claim to funds collected from the Tribe's lessee. *Crow III*, 969 F.2d at 848, Pet. App. 59. Following full briefing and oral argument, the Ninth Circuit dismissed the appeal as improvidently granted because that issue had already been decided in favor of the Tribe and the United States in *Crow II*. *Ibid*.

D. Proceedings Below (in *Crow IV*)

After the Ninth Circuit's decision in *Crow III* and a trial, the District Court issued its decision in November 1994. Its analysis was predicated on its conclusion that "it is a question of fact . . . whether a remedy in restitution arises at all in this case." Pet. App. 46-47. It recognized that Montana's illegal coal taxes had significant adverse impacts on the Tribe and had contravened Congress' overriding objective of encouraging self-government and economic development. Pet. App. 27-29, 45 and 50. In the District Court's view, however, these factors favoring the Tribe were outweighed by others. Pet. App. 31-37, 45-54. Finding that it would not be unjust for Montana and Big Horn County to retain the taxes they illegally imposed

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[6] *Humboldt County v. Lander County*, 56 P.228 (Nev. 1899); *City of Norfolk v. Norfolk County*, 91 S.E. 820 (Va. 1917); and *Board of Highway Comm'rs v. Bloomington*, 97 N.E. 280 (Ill. 1912).

and collected on Crow coal, the District Court ruled that the Tribe and the United States were not entitled to any recovery. Pet. App. 52, 54.

In its conclusions of law, the District Court reiterated its previous *Crow III* ruling that the Tribe and the United States were not automatically barred from recovering taxes paid by the Tribe's lessee. Nevertheless, the District Court found that "the lack of privity" between the Tribe and Montana "has its place in determining restitution damages." Pet. App. 48-50. It did not address Montana's argument that this Court's subsequent decision in *United States v. California*, 507 U.S. 746 (1993), undermined the vitality of the Ninth Circuit's decision in *Crow III*.

The Ninth Circuit reversed. It stated that the District Court:

> [F]ailed to give appropriate weight to the law of this case as established in the three prior appeals. In the process of weighing the equities in favor of and against restitution, the district court in effect reconsidered questions of law already decided by this Court in the prior appeals. Nearly every factor relied upon by the district court to determine that the Tribe was not entitled to relief is either contradicted or made irrelevant by our earlier holdings.

Crow IV, 92 F.3d at 828, Pet. App. 8.

With regard to the privity issue, the Ninth Circuit held that the District Court had erred and ignored the law of the case by denying relief based in part on the fact that the taxes were paid by the Tribe's lessee. *Crow IV*, 92

F.3d at 828-29, Pet. App. at 8-9. It found that Westmoreland had agreed to pay the tribal tax in the 1982 amendment to the coal lease and that Westmoreland "was willing to pay coal taxes to the Tribe as early as 1976." Consequently, "there was no reason for the [district] court to distinguish between the taxes collected before and after 1982." *Crow IV*, 92 F.3d at 830, Pet. App. 11-12. The Ninth Circuit also rejected Montana's reliance on *California* because *California* "involved an entirely different factual situation." *Crow IV*, 92 F.3d at 828-29 n.2, Pet. App. 8-9; 93 F.3d at 1194-95, Pet. App. 16.

The case was remanded to the District Court "for entry of an order directing the State and County to disgorge the improperly collected taxes." The District Court also was instructed to consider the request of the Tribe and the United States for prejudgment interest. *Crow IV*, 92 F.3d at 830, Pet. App. 12.

ARGUMENT

I. THIS CASE IS FACTUALLY UNIQUE AND LEGALLY PEDESTRIAN.

It is established that Montana and Big Horn County violated the federal rights and interfered with the federally protected sovereignty of the Tribe and thwarted Congress' overriding objectives by illegally imposing and collecting more than $58 million in taxes on the Tribe's coal. The State and County are seeking to retain the money they unlawfully obtained at the Tribe's expense in violation of federal law. They do not question the obvious but fundamental point that the relief granted by the

Ninth Circuit in *Crow IV*, disgorgement of the illegally collected taxes, would effectuate the purpose of the laws that were broken and partially make good the wrong done to the Tribe. Conversely, the denial of the restitutionary relief sought by the Tribe and the United States would leave the Tribe without a remedy for the wrongs inflicted by Montana from 1976 through 1983 and by Big Horn County from 1975 through 1986 and would allow them to profit from their own wrongdoing.

After the decision in *Crow I*, the District Court ordered that the challenged severance taxes be paid into a court supervised escrow account. Those funds with the interest they earned were awarded to the United States in trust for the Tribe following this Court's summary affirmance in *Crow II*. See *Crow IV*, 92 F.3d at 828, Pet. App. 7; Pet. App. 35. Montana neither contested nor appealed that final judgment. Since then, Westmoreland has paid all severance and gross proceeds taxes on Crow coal to the United States in trust for the Tribe pursuant to the 1982 amendment to the 1974 Crow/Westmoreland lease. As held in *Crow III*, there is no justification for treating the funds now at issue differently.

The petition does not raise an issue of broad application or importance. This case is fact specific and the legal issue presented is not likely to recur. As this Court recognized in *Cotton Petroleum*, 490 U.S. at 186 & n.17, the taxes here at issue are "unique." They were held invalid in part because they are so "extraordinarily high." Petitioners have not pointed to taxes of any other jurisdiction which impose comparable burdens on Indian tribes or tribal property. Another unusual aspect of the instant case is that Westmoreland did not seek refunds of the taxes it

paid to the State and County and later waived any claim to that money.

Due to the extraordinary nature of the taxes at issue and to their devastating impact on the mineral wealth held by the United States in trust for the Tribe, the United States intervened in support of the Tribe's claims.[7] The government's participation as a co-plaintiff precludes Montana from raising Eleventh Amendment defenses. *Arizona v. California*, 460 U.S. 605, 614 (1983). Cf. *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___ (No. 94-1474, decided June 23, 1997), in which suits by tribes against states and state officials were held barred by the Eleventh Amendment. The absence of any Eleventh Amendment issues due to the presence of the United States underscores the uniqueness of this case and further diminishes the likelihood that the issue this Court is being asked to consider will arise in future actions.[8]

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[7] The large amount of money at stake reflects the "enormous revenues" generated by Montana's "extraordinarily high" coal taxes and the extent to which the collection of those taxes unjustly enriched the State and County and deprived the Tribe of revenues it otherwise would have received. *See supra* at 9-10.

[8] During the past 25 years, the United States has participated as a party in few, if any, cases challenging the validity of state taxes as applied to Indians, Indian tribes and their property or activities. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

From a legal standpoint, there is nothing unusual or remarkable about the relief granted by the court below. The Ninth Circuit simply did what federal courts have been doing "[f]rom the earliest years of the Republic," exercising their inherent equitable powers to remedy the invasion of federally secured rights. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-67 (1992) (" 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done' "), *citing, inter alia, Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); and *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838), and *quoting Bell v. Hood*, 327 U.S. 678, 684 (1946). As stated in *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971), "[o]nce a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[9] It is also

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[9] In fashioning appropriate relief, the primary consideration is carrying out the purposes of the statute that was violated. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (the determination of appropriate relief "must be measured against the purposes which inform [the statute]"); *Mitchell v. De Mario Jewelry*, 361 U.S. 288, 292 & 296 (1960) (the "statutory purposes leave little room for the exercise of discretion not to order reimbursement"). Equitable relief required to remedy the invasion of federally secured rights and to effectuate the statutory purpose may be denied only if based on an estoppel or on the plaintiff's closely related illegal conduct. *Albemarle*, 422 U.S. at 417-25; Dan B. Dobbs, *Dobbs Law of Remedies*, § 2.4(7) at 119 (2d.Ed. 1993). Contrary to the district court's decision below, federal courts do not have broad or unfettered discretion to exercise their equitable powers in an *ad*

well established that "the federal courts [are not] restricted to the remedies available in state courts in enforcing . . . federal rights" and that the relief available in federal court for the violation of federal rights may not be "unduly circumscribed by state law." *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 350-51 (1939). *Accord, Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979).

The Ninth Circuit's disgorgement remedy in the instant case is just like the equitable relief granted to correct violations of constitutional rights, as exemplified in *Swann*, the equitable remedies fashioned to give effect to Indian treaty fishing rights, as in *Fishing Vessel Ass'n*, 443 U.S. at 692-96, the constructive trust ordered to carry out the national security policy of the United States embodied in a federal employment contract, as in *Snepp v. United States*, 444 U.S. 507, 514-16 (1980) (per curiam), and the declaratory and monetary relief required to effectuate the statutory purpose of preventing obstructions to commerce on navigable waterways, as in *Wyandotte Transportation v. United States*, 389 U.S. 191, 201-05 (1967). In these cases and many others, federal courts have exercised their inherent equitable powers to correct the wrongs inflicted on plaintiffs due to invasions of their federally secured rights. This case is no different.

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hoc manner "which varies like the Chancellor's foot." *Albemarle*, 422 U.S. at 417.

II. *CALIFORNIA* HAS NO BEARING ON THIS CASE.

Montana's principal argument is that the decision below conflicts with the holding in *United States v. California*. As the Ninth Circuit said, "*California* involved an entirely different factual situation." *Crow IV*, 98 F.3d at 1195, Pet. App. 16.

California does not preclude the Tribe's recovery for each of the following reasons: (i) the instant case is governed by the principle that, when *federally* secured rights are invaded, federal courts will grant appropriate relief to effectuate the federal purposes and make good the wrong done, whereas the government's claim in *California* was predicated exclusively on *state* law; (ii) there is no requirement that the relief awarded by federal courts to remedy violations of federal law must fit precisely within the confines of established common law causes of action; (iii) all of the essential elements of the common law assumpsit action for money had and received are satisfied; (iv) *California* does not hold that only taxpayers may seek recovery of illegally collected taxes; and (v) none of the factors which made it equitable for the state to be allowed to keep the taxes it collected from the federal government's contractor is present here.

A. *California* Did Not Involve The Equitable Powers Of Federal Courts To Remedy Violations Of Federal Law.

In *California*, the United States attempted to federalize a cause of action predicated on state law in order to circumvent state filing requirements which otherwise

barred the claim.[10] This Court held that under these circumstances the United States could not use "the existence of an obligation to indemnify [its contractor] to create a federal cause of action for money had and received to recover state taxes paid by [its contractor]. . . ." 507 U.S. at 754. The federal action was "inappropriate . . . because the Government is in no better position than as a subrogee of its [private] contractor." 507 U.S. at 752.[11]

Here, in stark contrast, the underlying claims of the Tribe and the United States are predicated on federal law, the violation of the Tribe's rights under the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g, and interference with the Tribe's sovereignty. Montana directly violated the *Tribe's* rights under federal law whereas in *California* the government stood in the shoes of its subrogee, the taxpayer, whose claims were predicated exclusively on

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[10] The government's claim was "posited upon the interpretation of a state-created exemption from a state[-] created sales tax." The United States sued in its proprietary capacity and stood in the shoes of its contractor; there was no sovereign interest of the United States. There were no allegations that the state taxes were preempted by federal law or violated the Constitution. 507 U.S. at 748-51.

[11] This Court also noted that different rules apply to the United States depending on whether it is acting in its proprietary capacity, as in *California*, or as a sovereign. 507 U.S. at 757-58. Where, as here, the United States sues as trustee on behalf of Indian beneficiaries, it is exercising its sovereign authority. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 473-75 & n.13 (1976); *United States v. Minnesota*, 270 U.S. 181, 194-95 (1926); *United States v. Rickert*, 188 U.S. 432, 444-45 (1903).

state law.[12] The remedy issue in this case therefore is governed by the principle, recently reaffirmed in *Franklin*, that where *federally secured rights* are invaded, federal courts will grant relief necessary to effectuate the congressional purpose and to make good the wrong done.[13]

Moreover, Montana's reliance on *California* is predicated on a fundamentally flawed, albeit unspoken, major premise. Its argument mistakenly assumes that when a violation of federal law is established, the relief federal courts may grant is limited to traditional common law remedies. That is not the law. In *Wyandotte*, for example, this Court upheld the right of the United States to impose

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[12] The United States and the Tribe are not claiming by, through or under Westmoreland. The Tribe's action and standing are based on the violation of its federally secured rights, not on a voluntary indemnification agreement. The Tribe, not Westmoreland, is the intended beneficiary of the federal laws promoting Indian mineral development and recognizing and protecting tribal sovereignty.

[13] Westmoreland makes no claim to the illegally collected taxes, so there is no contest between the Tribe and Westmoreland regarding the disposition of those funds. If such a claim were presented, the guiding principle would be to award the funds in the manner that best effectuated the purpose of the federal laws Montana violated. *See supra* at 17 n.9. Westmoreland's position from the outset was that it was willing to pay either a tribal or state tax but not both, *Crow IV*, 92 F.3d at 830, Pet. App. 11-12; Tribe's ER 12-13, so it is difficult to understand how a court of equity could justify granting Westmoreland immunity from *both* state and tribal taxes. In any event, whatever *Westmoreland* did or did not do, or would have or would not have done, does not have any bearing on whether Montana should be allowed to keep the money it obtained in violation of the *Tribe's* federally secured rights and at the *Tribe's* expense.

liability on shipowners under the Rivers and Harbors Act of 1895 for the negligent sinking of their vessels because that remedy was necessary to fulfill the statutory purpose. This Court specifically declined to decide whether the United States would have been entitled to that relief in the absence of the statute. 389 U.S. at 196 n.5. *See also* the discussion *supra* at 17-18. Montana has not cited a single case, and the Tribe is not aware of any, in which equitable relief for the violation of a federal law was denied on the ground that not all the prerequisites for a common law cause of action were satisfied.

The instant case involves a cognizable cause of action brought pursuant to federal laws. Violations of these laws have been established. Consequently, the issue of appropriate relief is controlled by *Franklin* and the long line of decisions on which it relies, not *California*.

B. The Fact That The Tribe Did Not Pay The Illegal Taxes Does Not Foreclose The Disgorgement Remedy.

Assuming arguendo that the claim of the Tribe and the United States is predicated on assumpsit and constructive trust causes of action (as opposed to equitable relief to remedy violations of federal law), all of the required elements of those actions are satisfied. Assumpsit, an action for money had and received, like the imposition of a constructive trust,[14] requires proof of

[14] Both assumpsit and constructive trust actions are predicated on a claim of unjust enrichment. The difference is that a successful assumpsit action results in a judgment

three elements: (i) a wrongful act; (ii) specific property acquired by the wrongdoer which is traceable to the wrongful behavior; and (iii) a reason why the party holding the property should not be allowed in good conscience to keep it. *Alsco-Harvard Fraud Litigation*, 523 F.Supp. 790, 806-07 (D.D.C. 1981) (and cases therein cited). *See also, Schaeffer v. Miller*, 41 Mont. 417, 423, 109 P. 970, 973 (1910); Pet. App. 43, 70-71. If these elements are present, the law implies the existence of a contract to turn over the wrongfully acquired property to its rightful owner. *See, Midwest Aviation, Inc. v. General Electric Credit Corp.*, 907 F.2d 732, 736-37, 743-44 (7th Cir. 1990) ("[q]uasi-contractual duties arise only in situations of unjust enrichment, situations where 'one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it and which *ex cequo et bono* belongs to another' ").

This Court's decision in *Snepp* illustrates the use of the constructive trust remedy to correct a violation of federal law. *Snepp* involved the publication of a book by a former CIA agent contrary to the covenant in his employment agreement not to publish any material relating to the CIA without the agency's prior approval. The wrongful act was the agent's publication of a book about the CIA without approval. The property acquired by the agent traceable to his wrongful behavior was the money derived from the sale of the book. The reasons the agent was not allowed to keep that money were that the book

imposing personal liability whereas a constructive trust operates against specific property. Pet. 13 & n.4; Pet. App. 43, 70-71.

was written in violation of the agent's employment covenant and that it was equitable to require him to disgorge the benefits of his faithlessness. 444 U.S. at 515. In addition, this Court noted that the constructive trust remedy conformed the relief to the dimensions of the wrong and that that relief was the most equitable and effective means of fulfilling the purpose of the covenant, protecting intelligence that could affect the Nation's security interests. 444 U.S. at 514-16.

The instant case is on all fours with *Snepp*. Here, the wrongful acts are the imposition and collection of the invalid state coal taxes in violation of federal law. The wrongfully acquired property is the $58 million in illegally collected coal tax revenues. The reasons why Montana should not be allowed to keep that money and why it should be paid over to the Tribe are that it was acquired in violation of the Tribe's rights under federal law and that disgorgement would effectuate the purpose of those laws and at least partially make good the wrongs done to the Tribe.

Nothing more is required. In its December 1990 decision denying Montana's motion for summary judgment, the District Court carefully considered and squarely rejected Montana's argument that restitutionary relief is precluded because the taxes were paid to Montana and Big Horn County by Westmoreland, not by the Tribe. Relying on case law from Montana[15] as well as other jurisdictions,[16] the District Court correctly concluded that the

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[15] *Valley County v. Thomas*, 109 Mont. 345, 97 P.2d 345 (1939).

[16] *Humboldt Co. v. Lander Co.*, 56 P. 228 (Nev. 1899); *City of Norfolk v. Norfolk County*, 91 S.E. 820, 822-24 (Va. 1917); and

claim of the Tribe and the United States to the illegally collected taxes turns on the issue of unjust enrichment, not the identity of the taxpayer. Pet. App. 79-81. Here, as in *Snepp*, the relationship between the wrongdoers and their victims that is necessary to obtain appropriate equitable relief is founded on the violations of the victims's federally secured rights. That is precisely what the Ninth Circuit held in *Crow II*.

California does not stand for the proposition that only taxpayers may recover taxes illegally imposed and collected by governmental entities. This Court pointed out that the federal government's contractor had challenged the state's taxes, had its day in court, settled its claim and gone home. 507 U.S. at 752. The federal government's claim was derived from its contractor and both the government and its contractor had a full and fair opportunity to challenge the validity of California's taxes under state law. 507 U.S. at 750, 756-57. The failure of the federal government to comply with state filing requirements barred its claim for a tax refund. 507 U.S. at 756-57. Since an adequate remedy was available which the federal government had failed to utilize, it was not unjust for California to keep the money it collected from the contractor, just as it would be able to retain taxes received from any other taxpayer who failed to follow procedures required to obtain a refund. When the federal government "challenge[s] a state tax on state-law grounds," it should not be treated any differently than other taxpayers "simply because it is the Government." 507 U.S. at 759-60.

Board of Highway Comm'rs v. Bloomington, 97 N.E. 280, 283-85 (Ill. 1912).

This case is completely different. The Tribe's claim is predicated on the unlawful appropriation and conversion of its mineral wealth and the violation of its federally secured rights, not on state law or a voluntary indemnification agreement. The Tribe is not claiming by, through or under Westmoreland. *See supra* at 21 n.12. There is no contention that the Tribe's rights have lapsed or that its claim is barred. Nor is there an attempt to circumvent a stale state claim by substituting a federal cause of action. Granting the relief sought by the Tribe and the United States would not result in unfair treatment vis-a-vis other taxpayers.[17] In short, none of the factors which made it equitable for California to be allowed to keep the taxes it collected from the federal government's contractor is present here.

III. THERE IS NO CONFLICT WITH THE TENTH CIRCUIT'S DECISION IN UTE INDIAN TRIBE V. STATE TAX COMMISSION.

The decision below does not conflict with *Ute Indian Tribe v. State Tax Comm'n*, 574 F.2d 1007 (10th Cir. 1978),

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[17] *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages, and Tobacco*, 496 U.S. 18, 48 (1990) (states have no legitimate interest in being able to retain taxes imposed and collected in violation of federal law); *United States v. City of Spokane*, 918 F.2d 84, 89 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) (municipality required to disgorge the taxes it illegally collected from the Red Cross because "the only logical relief, aside from precluding further taxation, is to order the improperly taken monies refunded"); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990) (Indian tribe entitled to recover illegal taxes collected by California from private timber companies in violation of federal Indian law).

cert. denied, 439 U.S. 965 (1978). *Ute* was an action by an Indian tribe to invalidate Utah's taxes on sales of personal property by a tribal enterprise located within a reservation. Following this Court's decision in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Tenth Circuit held that the state tax was valid as applied to sales to non-Indians but invalid as applied to sales to Indians. The Tribe's claim for return of the invalid taxes paid by the buyers of the goods, collected by the tribal enterprise and turned over to the state was summarily rejected on the ground that only the buyers could seek recovery or refund of the taxes. 574 F.2d at 1009. *Ute* has not been followed or cited in any subsequent decision for the proposition that non-taxpayers may not seek to recover illegally collected taxes.

There are at least four critical distinctions between the instant case and *Ute*. First, in the instant case, unlike *Ute*, the state's "extraordinarily high" taxes operated against the Tribe's own property and significantly diminished its value. *See supra* at 5 and 10-11. In *Ute*, by contrast, no tribal property was involved and the state's taxes operated only against the individual buyers. Second, in the instant case the Ninth Circuit expressly found, based on substantial evidence, that Montana's taxes took revenue that would otherwise go to the Tribe. *See supra* at 5, 7, 10-11, and 13-14. There was no such claim or finding in *Ute*. Third, the tribe in *Ute* did nothing more than collect the state's taxes whereas Montana's taxes imposed substantial burdens on the Tribe and had a negative effect on the Tribe's ability to market its coal. *Cotton Petroleum*, 490 U.S. at 186 n.17; *Crow II*, 819 F.2d at 899, Pet. App. 97-98. Fourth, here, unlike *Ute*, the rights of the Tribe

under a federal statute were violated and the remedy fashioned by the Ninth Circuit is necessary to effectuate the purpose of that statute during the periods the taxes were collected illegally by Montana and Big Horn County.

In short, the *Ute* Court held that the tribe was not the injured party so far as the recovery of invalid sales taxes on personal property was concerned. The taxes involved here are totally different. The findings of *Crow I, II, III* and *IV* clearly establish that the Tribe was the rightful recipient of the taxes illegally imposed on the Tribe's trust assets and collected from Westmoreland.

For all of these reasons, the outcomes in *Ute* and *Crow IV* are compatible. The Tribe certainly is a proper party to seek recovery of the coal taxes which unjustly enriched Montana and Big Horn County.

CONCLUSION

With full awareness of the risks, Montana and Big Horn County deliberately and wrongfully appropriated the Tribe's mineral wealth and obtained enormous benefits for themselves in violation of federal law. The Ninth Circuit fashioned an appropriate remedy to correct those wrongs. Its decision does not conflict with the decision of this or any other court. It is supported by and is consistent with the long line of cases affirming the broad equitable power of federal courts to fashion appropriate remedies to correct invasions of federally secured rights. The facts of this case are unique and are not likely to

recur. There is no issue that warrants review by this Court.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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